

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF THE ATTORNEY GENERAL**



**ATTORNEY GENERAL
BRIAN L. SCHWALB**

Legal Counsel Division

January 19, 2023

Alan Kensek
Commissioner, ANC 1B05
2101 16th Street, N.W.
Washington, D.C. 20009

Re: Censure Special Committee and Appeals

Commissioner Kensek:

When an Advisory Neighborhood Commission (“ANC”) censures one of its Commissioners, it must do so in a manner consistent with the Constitution; District law, including the Advisory Neighborhood Commissions Act of 1975 (“ANC Act”);¹ and its bylaws.² It must also follow Robert’s Rules of Order on matters not addressed by District law or its bylaws.³ You asked us two questions:

- (1) Whether your ANC’s vote to censure you on November 4, 2022 was consistent with these requirements; and
- (2) What the proper mechanism for challenging a censure would be.

We conclude that, although the censure process conformed to the requirements of the ANC Act and Robert’s Rules in many important respects, the censure was not properly imposed. Given that this Office’s role is limited to providing legal interpretations, not finding facts, we reach no judgment as to whether the censure proceeded with the impartiality that Robert’s Rules required, nor whether the ANC provided you sufficient opportunity to defend yourself. Nonetheless, we conclude that the ANC censured you for conduct it had no authority to discipline you for because it is not included in your ANC’s bylaws. We also conclude that the censure process may have contravened the ANC Act and Robert’s Rules in some other respects. As to your second question, the validity of the censure, and the question of how the censure will be handled, must be raised and resolved in a meeting of your ANC.

¹ Effective October 10, 1975 (D.C. Law 1-21; D.C. Official Code § 1-309.01 *et seq.*).

² See D.C. Official Code § 1-309.11(d).

³ See *id.* § 1-309.11(e)(3) (“Where not otherwise provided, the procedures of the Commission shall be governed by Robert’s Rules of Order”). The most up-to-date version of Robert’s Rules of Order (“Robert’s Rules”) is the 2022 edition. See Robert’s Rules of Order Newly Revised (12th ed. 2022).

We note that the scope of our letter is limited in another respect. Many of the concerns we raise here apply in the specific context of a formal censure, a form of discipline that is based on a Commissioner's alleged violation of standards the Commissioner was required to conform to, and that may (depending on the ANC) carry concrete consequences for the accused Commissioner. None of our analysis should be read to preclude an ANC from simply issuing a non-disciplinary reprimand against a Commissioner for conduct that the ANC determines was inappropriate, although an ANC considering this approach should take care to ensure that any allegations it wishes to deploy are well-founded.

This letter will start with background about the requirements that apply to a censure and our limited role in evaluating the lawfulness of one, as well as about this censure. We will then offer and explain our conclusions.

Background

I. Legal Requirements and Our Office's Role

Prior letters from this Office⁴ have explained the requirements for censure in detail, so we will only summarize them here. As described in Robert's Rules, censure is a form of ANC discipline.⁵ It is an "official, public reprimand of a Commissioner's conduct."⁶ It can only be pursued for conduct that the ANC has duly prohibited Commissioners from engaging in,⁷ including violations of Robert's Rules or the ANC's bylaws.⁸ When pursued for conduct that took place outside any ANC meeting, it must be pursued under a fair and impartial process that includes careful fact-finding and a reasonable opportunity for the accused Commissioner to respond.⁹ It must also, at each step, abide by the requirements of the ANC Act, which requires a careful balance of transparency and confidentiality. Meetings of the ANC or of a special committee convened for fact-finding purposes must be open to the public,¹⁰ but at the same time, the allegations and the evidence supporting them must generally remain confidential in keeping with Robert's Rules, since the reputation of the Commissioner facing censure is at stake.¹¹

When our Office is asked to review the lawfulness of a censure, we have exercised a carefully limited role, informed by the boundaries we more generally observe in offering legal interpretations to ANCs. Whenever we answer questions from an ANC or from an individual Commissioner, we do so for the purpose of advising the ANC as a whole. Moreover, our function

⁴ Prior letters from our Office are available at <https://oag.dc.gov/about-oag/laws-and-legal-opinions/legal-advice-ancs> (all websites last visited Dec. 12, 2022).

⁵ Robert's Rules § 61.

⁶ Letter to Comm'r Delle Donne, Nov. 29, 2017, at 1.

⁷ Letter to Comm'r Kensek, Oct. 25, 2022, at 2.

⁸ See D.C. Official Code § 1-309.11(d).

⁹ See Letter to Comm'r Delle Donne, *supra*, at 2; Letter to Comm'r Kensek, *supra*, at 2; Letter to Comm'r Muhammad, Sept. 16, 2019, at 2; Letter to Comm'r Ransom, July 20, 2009, at 2-3.

¹⁰ D.C. Official Code §§ 1-207.42(a) (requiring open meetings when a public body takes official action) and 1-309.11(g) ("No meeting" of an ANC or ANC committee "may be closed to the public unless personnel or legal matters are discussed").

¹¹ See Letter to Comm'r Delle Donne, *supra*, at 2; Letter to Comm'r Ransom, *supra*, at 3; Robert's Rules § 63.

in advising ANC's is to supply "legal interpretations of statutes concerning or affecting the Commissions, or of issues or concerns affecting the Commissions";¹² we are not fact-finders. Accordingly, although we may opine on the lawfulness of a censure process, we do not resolve disputed questions of fact. Nor do we offer any conclusions about the motivations of those involved. For example, we will not offer conclusions as to the partiality or impartiality of any Commissioner. Nor do we offer any judgment as to the truth of any allegation that forms the basis of a censure. What is more, the reasoning we offer in this and other letters reflects this Office's best view of the law, but it is advisory; it does not carry the force of law and thus is not legally enforceable.

II. *Factual Background of this Censure*

The formal censure process began in your ANC's October 6, 2022 regular public meeting.¹³ Commissioner Eric Behna moved to convene a special committee to review seven allegations against you, which were recited in the meeting. We will not recite those allegations here, but they divided essentially into three categories: (1) alleged misuse of your title outside the context of any ANC proceeding; (2) allegations pertaining to text and email exchanges with other Commissioners; and (3) alleged campaign-finance violations. The ANC voted to convene a four-person special committee to review the allegations, which would be required to submit a report to the ANC ahead of its meeting on November 4, 2022, in which the ANC would vote on whether (and if so, on what grounds) to issue a censure.

The special committee met on October 27, 2022.¹⁴ It had sent you a preliminary review of the allegations earlier in the day and had given you five days to respond to it. The committee did not directly comment on the evidence it had before it, but it heard your opening statement, public comments, and statements by Commissioners with direct knowledge related to some of the allegations. The committee did not vote on those recommendations in that meeting, and to our knowledge, it conducted no other public meeting.

The censure vote took place in the ANC's November 4, 2022 regular meeting.¹⁵ Discussion of the censure revolved around four documents that had been submitted by the special committee chair and were contained within the ANC's meeting agenda:¹⁶ the initial documents the committee sent you, a version of your responses, a statement of conclusion saying that the committee had voted for some censure allegations and against others, and a draft resolution for the ANC's consideration. The vote was called, and the ANC voted to adopt the censure.

¹² See D.C. Official Code § 1-309.12(d)(4).

¹³ A recording of that meeting can be found at <https://www.youtube.com/watch?v=hzTWduoCqeM>.

¹⁴ The video for the special committee meeting is available from <https://us06web.zoom.us/rec/share/avIGjIMCfSlnOcuKFB2Xasj-jJVFI3whVWt56nsRzLzFe9tXZyzpwyN8BLxF78ac.wR7Dg-uH5TBhjhkd?startTime=1666911700000> (password D42TL=#i).

¹⁵ See <https://www.youtube.com/watch?v=DUouqywbvMA>.

¹⁶ ANC 1B Monthly Meeting Agenda: Nov. 3, 2022, available at <https://www.anc1b.org/announcements/november-2022>.

Analysis

I. Lawfulness of the Censure

In many respects, your ANC's censure proceedings conformed to the requirements of applicable law. As required under Robert's Rules, the ANC formed a special committee to review the censure allegations;¹⁷ the committee conducted fact-finding and submitted findings and recommendations to the ANC; the ANC provided an opportunity for you to respond at each stage; and then the ANC proceeded to a vote.¹⁸ These steps, which accord with prior letters from this Office, played a vital role in allowing the ANC to carefully review the allegations presented.

Your principal basis for contesting the ANC's censure is your allegation that the process, and the Commissioners conducting it, were not impartial, especially since the vote to censure you took place just before the 2022 general election. In keeping with our limited role here, we offer no viewpoint on this contention. Even so, we conclude that the censure exceeded the ANC's disciplinary authority. The censure process may also have departed from the requirements of the ANC Act and Robert's Rules in at least two other respects. Although these other departures do not necessarily affect the validity of the censure, they are nonetheless cause for concern.

(1) The censure exceeded the ANC's disciplinary authority

The ANC voted to censure you on two of the three grounds we noted above: (1) conduct alleged to have taken place outside any ANC meeting, and that involved the alleged misuse of your title; and (2) conduct that allegedly violated the ethics requirements applicable to Commissioners under District law. The ANC alleged that both grounds involved violations of the ANC's Code of Conduct.¹⁹ But those violations were not valid grounds for discipline here. To the extent the ANC has the authority to regulate Commissioner conduct, it does so through its bylaws. Your ANC bylaws, however, do not contain the Code of Conduct or any reference to it. Absent an amendment to the bylaws that incorporates the Code of Conduct into them,²⁰ that Code is not binding on Commissioners, which means violations of that Code cannot constitute valid grounds for discipline.

Our reasoning here echoes prior letters from our Office. For example, in a 2021 letter to Commissioner Jonah Goodman, we explained that the ANC Act establishes bylaws as the exclusive means for an ANC to govern its operations.²¹ Accordingly, "anything that actually governs the operation of an ANC is a bylaw and must be adopted and disseminated to the public

¹⁷ The special committee consisted only of Commissioners. This, we explained in an earlier letter to you, was permissible. See Letter to Comm'r Kensek, Oct. 18, 2022.

¹⁸ See Robert's Rules § 63 (describing the fact-finding process).

¹⁹ The Code of Conduct is available from <https://www.anc1b.org/anc-1b-bylaws>. It appears that the ANC voted to censure you on a third ground pursuant to a Commissioner's amendment shortly before the ANC proceeded to a vote. This third allegation was described as an allegation of harassment, and it appeared to involve internal ANC communications. Even so, however, that third ground relies on the same Code of Conduct that the other two do.

²⁰ Your ANC bylaws do require your ANC to abide by the ANC's Standard Operating Procedures. See ANC 1B Bylaws art. VIII, sec. 4. But as the Code of Conduct acknowledges, those Standard Operating Procedures are a different document. See Code of Conduct at 1. Moreover, the Standard Operating Procedures make no mention of the Code of Conduct. See <https://www.anc1b.org/new-page>.

²¹ Letter to Comm'r Goodman, Aug. 5, 2021, at 2.

as one.”²² We thus clarified that Commissioners are not bound by (which means they cannot be disciplined on the basis of) a separate policy document that the bylaws do not even cross-reference and require Commissioners to follow.”²³

We applied the 2021 letter’s reasoning to an ANC’s Standards of Decorum and Conduct earlier this year. In a May 17, 2022 letter to Commissioner Ulysses Campbell, we offered comments on the ANC’s existing Standards, as well as on proposed bylaw provisions that would govern Commissioner speech. As to the proposed bylaw provisions, we explained that they would need to be limited in two ways. They could “not apply when a Commissioner is acting outside ANC proceedings and not using ANC property (such as an ANC cell phone or a computer in the ANC office).”²⁴ They must also be “clear about what is prohibited,” and cannot “prohibit expression that the First Amendment protects.”²⁵ After explaining that these same principles would apply to the existing Standards of Decorum and Conduct, we then cautioned that those Standards were currently “advisory rather than binding” because those standards were “not bylaws” and the ANC’s bylaws did not “require that they be adhered to.”²⁶

(2) *Other concerns with the censure process*

(A) *The ANC impermissibly restricted your efforts to defend yourself.*

You allege that the ANC restricted your efforts to defend yourself during the November 4, 2022 meeting by impermissibly limiting your remarks. Approximately 2 hours and 7 minutes into the meeting, a Commissioner who was also on the special committee announced that comments on the proposed censure would be limited to one per person. About seven minutes later, while you were speaking in your own defense, another member of the special committee gave you one minute to conclude your remarks, indicating that Commissioner remarks were time-limited. And roughly two minutes after that, another member of the special committee called a point of order on the basis that you exceeded your time limit and were reading from the letter you had sent the committee.

We are not in a position to determine whether this restriction of your speaking time inhibited your ability to fully defend yourself as Robert’s Rules guarantees. It is possible that it did not, especially since you were given another opportunity to speak shortly before the ANC voted. Regardless, it was impermissible as a legal matter. The time limits cited as a basis for cutting your remarks short had not been adopted by the ANC, which means they could not form the basis of a valid point of order.²⁷ The only time limit the ANC could enforce would be the 10-minute time limit established

²² *Id.* at 1.

²³ *See id.* at 2.

²⁴ Letter to Comm’r Campbell, May 17, 2022, at 2.

²⁵ *Id.* at 4. The requirement that regulations of ANC conduct give an ANC fair notice of what is prohibited is also why an ANC cannot rely on Robert’s Rules to impose discipline any time it believes a member has engaged in “conduct injurious to the [ANC] or its purposes.” Robert’s Rules § 61:1.

²⁶ Letter to Comm’r Campbell, *supra*, at 3.

²⁷ We note, however, that the objection to reading your statement – whether or not the full body of what you read was already in the record – may have been valid. Under Robert’s Rules, although a Commissioner can read “short,

as the default by Robert's Rules,²⁸ and you had not reached that since you had only spoken for approximately 5 minutes. Moreover, even after the point of order was raised, the chair never ruled on it and no vote took place.²⁹ Accordingly, even if the point of order itself had been lawfully raised, the ANC had no authority to immediately terminate your remarks and move on to the next speaker.

(B) *It is not clear whether the special committee's censure recommendations were properly adopted.*

Your ANC was presented, at its November 4, 2022 meeting, with what were described as the recommendations of the 4-member special committee that reviewed your censure. Those recommendations were described as having been adopted by vote. A vote normally indicates a meeting, but we are not aware of any public special committee meeting in which these recommendations could have been adopted. If these recommendations were adopted in a committee meeting without prior public notice or were adopted in a committee meeting that was closed to the public, that would contravene the ANC Act. Under the ANC Act, any meeting, including a meeting of an ANC committee, must be preceded by public notice,³⁰ and any committee meeting in which a vote was taken must be open to the public.³¹

II. *Means for Challenging a Censure*

The principal means for challenging an improperly entered censure is a point of order.³² Under Robert's Rules, a point of order is the vehicle for responding to an alleged violation of an assembly's rules.³³ Ordinarily, a point of order must be "raised promptly at the time the breach occurs."³⁴ But where a breach is of a "continuing nature," such that the assembly's action is "null and void," a point of order may be raised at "any time during the continuance of the breach," *i.e.*, "any time that the action has continuing force and effect."³⁵ Accordingly, some or all of a censure that an ANC lacked the authority to adopt may be challenged at any time while the censure carries force and effect. As we previously advised,³⁶ an unlawfully adopted censure resolution may therefore be challenged at any time, including during a new ANC term, since a censure resolution

pertinent, printed extracts in debate," they cannot otherwise read from "any paper or book" in their remarks if another Commissioner objects. Robert's Rules § 43:27.

²⁸ See *id.* §§ 43:8 (setting the default) and 43:17 (requiring a 2/3 vote to restrict speaking time on a particular measure).

²⁹ See *id.* § 23:2 (a point of order must either be ruled on by the chair or referred to the assembly for a vote).

³⁰ D.C. Official Code § 1-309.11(c).

³¹ This is because the ANC Act requires ANC committees to follow section 742 of the Home Rule Act (*id.* § 1-207.42), and thus to take a vote only in a meeting that is open to the public. *Id.* § 1-309.11(g).

³² See Letter to Comm'r Delle Donne, Nov. 29, 2017, at 3.

³³ See Robert's Rules § 23:1.

³⁴ *Id.* § 23:5.

³⁵ *Id.* § 23:6.

³⁶ See Letter to Comm'r Delle Donne, Nov. 29, 2017, at 3.


adopted during one ANC term continues to have force and effect as the ANC's official condemnation of conduct even after the two-year term during which it was adopted ends.³⁷

A point of order, however, is not the only means of undoing a prior censure. Depending on whether and to what extent consequences of the censure has already been imposed (by, for example, removing a Commissioner from current committee assignments), a Commissioner may move to rescind a previously adopted censure while that censure still carries force and effect.³⁸ A member who previously voted in favor of a censure may also, while the censure carries continuing force and effect, vote to reopen the matter through a motion to reconsider.³⁹ Moreover, a Commissioner who seeks, not to undo a censure entirely, but merely to modify it, may do so through a motion to amend.⁴⁰

Please let us know if you have further questions on this matter.

Sincerely,

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(AL-22-704 C)

³⁷ See Letter to Comm'r Coumaris, Mar. 12, 1997, at 1 (ANC bylaws do not expire every two years because an ANC is a continuing body). Although Robert's Rules indicates that "unfinished business" may lapse after a Commission term ends and a new term begins, *see* Robert's Rules § 21:7(c), nothing in Robert's Rules (and nothing in your ANC's bylaws) indicates that a completed, adopted disciplinary resolution such as a censure resolution expires in this fashion. *See* Letter to Comm'r Ryan, Dec. 17, 2004, at 2 (adopted motion does not expire at the end of a two-year ANC term).

³⁸ Robert's Rules §§ 35:2(1) (motion to rescind can be "applied to anything . . . which has continuing force and effect and which was made or created any time or times as the result of the adoption of one or more main motions") (emphasis omitted) and 35:3 (any member may move to rescind).

³⁹ *See id.* § 37.

⁴⁰ *See id.* § 35.